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Environmental Justice in an Era of Devolved Collaboration

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ENVIRONMENTAL JUSTICE IN AN ERA OF DEVOLVED COLLABORATION

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I. INTRODUCTION

Environmental decision-making is undergoing a profound shift. Traditional forums and processes are being displaced by mechanisms emphasizing local, "place-based" decision-making. These emerging decision-making mechanisms are orchestrated through collaborative processes featuring stakeholders from both the public and private sectors. This transformation is evident in a number of recent governmental initiatives, including those by the Environmental Protection Agency ("EPA"), most notably its Community-Based Environmental Protection ("CBEP") initiative.[1] Other federal agencies, particularly those with land or species management responsibilities, have similarly advocated a greater role for local decision-makers and collaborative problem-solving.[2] Most recently,

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[1] CBEP is the culmination of recent efforts by EPA that emphasize coordination among different levels of governmental decision-makers and enhanced public participation. *See* OFFICE OF POLICY & OFFICE OF REINVENTION, EPA, EPA-237-K-99-001, EPA'S FRAMEWORK FOR COMMUNITY-BASED ENVIRONMENTAL PROTECTION 3 (1999), *available at* http://www.epa.gov/ecocommunity/frame40.pdf [hereinafter CBEP FRAMEWORK].

[2] For example, the U.S. Forest Service has a "collaborative stewardship task force" that is actively searching for ways to promote a greater role for local collaborative efforts, an action that is consistent with the recommendations of the Committee of Scientists. *See generally* COMMITTEE OF SCIENTISTS, U.S. DEPARTMENT OF AGRICULTURE, SUSTAINING THE PEOPLE'S LANDS: RECOMMENDATIONS FOR STEWARDSHIP OF THE NATIONAL FORESTS AND GRASSLANDS INTO THE NEXT CENTURY (1999), *available at* http://www.fs.fed.us/news/science [hereinafter SUSTAINING THE PEOPLE'S LANDS]. Collaboration is also a key element of modern efforts to implement the Endangered Species Act, through tools such as habitat conservation plans and safe harbor agreements. *See, e.g.*, Endangered Species Act of 1973 § 4(a)(3)(A), 16 U.S.C. § 1533(a)(3)(A) (1994). In the past decade, the U.S. Bureau of Land Management has created a series of resource advisory councils ("RACs") to provide local input into policy decisions. Other national policy entities, such as the National Performance Review and the Council on Environmental Quality, have also promoted collaborative problem-solving. *See, e.g.*, Timothy Beatley, *Preserving Biodiversity Through the Use of Habitat Conservation Plans*, *in* COLLABORATIVE PLANNING FOR WETLANDS AND WILDLIFE 35 (Douglas R. Porter & David A. Salvesen eds., 1995); 43 C.F.R. § 1784.6-1 (2000) (establishing RACs for lands administered by the Bureau). *See generally* NATIONAL PERFORMANCE REVIEW, CREATING A GOVERNMENT THAT COSTS LESS AND WORKS BETTER (1993). Many non-administrative and non-governmental entities have also joined the

the Bush administration has hailed the move toward local, collaborative processes as ushering in a "new environmentalism for the 21st century."[3]

Whether described as collaborative stewardship, community-based environmental protection, civic environmentalism, or sustainable development, the move toward decentralized environmental decision-making is a clear paradigm shift away from the traditional command-and-control regulatory approach that embraces top-down, uniform national standards.[4] It is also a retreat from the "announce and defend" method of administrative decision-making, whereby government agencies make crucial decisions at junctures when the public is not involved, and subsequently the agency announces and defends its decisions to the public.[5] The push to expand the influence of local collaborative groups, so-called "devolved collaboration," is, indeed, more closely associated with the emergence of alternative dispute resolution techniques in environmental decision-making processes and is married to ideas of "regionalism" that permeate natural resources management.[6]

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growing chorus of support for collaborative approaches to environmental decision-making. *See, e.g.*, PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, SUSTAINABLE AMERICA: A NEW CONSENSUS FOR PROSPERITY, OPPORTUNITY, AND A HEALTHY ENVIRONMENT FOR THE FUTURE ch. 4 (1996), *at* http://clinton2.nara.gov/PSCD/Publications/TF_Reports/amer-chap4.html (championing local, consensus-based processes in environmental and land use decisions); WESTERN GOVERNORS' ASS'N, POLICY RESOLUTION 98-001, PRINCIPLES FOR ENVIRONMENTAL MANAGEMENT IN THE WEST (1998), *reprinted in Western Governors Adopt New Approach to Environment Regulations*, STATE ENVTL. MONITOR, July 6, 1998, at 3 (adopting resolution calling for increasing neighborhood solutions to environmental problems, heightened reliance on market incentives to environmental problems, and more emphasis on collaboration among stake-holders); ASPEN INSTITUTE, THE STEWARDSHIP PATH: TO SUSTAINABLE NATURAL SYSTEMS 17 (1999) (calling for a type of collaborative planning process that allows a "community" to "avoid natural resource problems by addressing potential conflicts before they arise").

[3] *Bush: The Eco Chamber*, HOTLINE WKLY., May 31, 2001, at 2, *at* http://nationaljournal.qpass.com/members/hotlineweekly/2001/053101.htm (describing this new approach as one in which the federal government will share responsibility for protecting the environment with state and local authorities, citizens and private groups) (on file with the Harvard Environmental Law Review). Reflecting on this approach, Gail Norton, Secretary of the Interior, recently proclaimed:

> [T]he era of mandates from Washington is giving way in the Bush administration to common sense solutions. I know from experience that the best natural resource planning is done at the local level and involves private landowners who know and love their land. When they're brought into the process early, they can feel invested in solutions and how their decisions are implemented.

Kathy Gambrell & Colin Sullivan, *Greens See Red Over Bush Budget*, UPI, Apr. 13, 2001, at LEXIS, News Library, Wire Service Stories File.

[4] *See* DEWITT JOHN, CIVIC ENVIRONMENTALISM: ALTERNATIVES TO REGULATION IN STATES AND COMMUNITIES 260 (1994).

[5] *See* Eileen Gay Jones, *Risky Assessments: Uncertainties in Science and the Human Dimensions of Environmental Decisionmaking*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 1, 25 n.107 (1997) (noting that "announce and defend" is a well-worn phrase in the literature).

[6] *See infra* Part IV.B.

The current impulse to rethink the appropriate administrative and geographic scale of decision-making power needed to tackle increasingly complex environmental problems is understandably strong and pervasive. The need for more creative solutions to environmental problems is widely acknowledged, as is the need for improved decision-making processes for identifying and equitably distributing the costs and benefits of environmental regulation and natural resources management.[7] Devolved collaboration promises to fulfill these needs by seeking answers to the current generation of environmental problems—including nonpoint source pollution, abandoned and contaminated industrial sites, urban sprawl, and management of complex ecosystems—from those closest to the problems.

In seeking more participatory, local, and holistic decision-making mechanisms, the move toward devolved collaboration intersects and converges with another prominent movement, environmental justice, in ways that are crucial for the future of modern environmentalism.[8] Though neither uniformly nor precisely defined, environmental justice is widely understood to be concerned, at the least, with distributional and procedural equity in environmental and natural resource decisions.[9] It is by now established that minority, low-income populations disproportionately suffer from an array of environmental and health risks, such as exposure to polluting facilities, congested roadways, lead paint, pesticides, and contaminated land. These populations obtain far fewer environmental quality benefits—such as access to open space, parks, clean water, and waterfront resources—than wealthier and whiter populations.[10] These environmentally disadvantaged populations also tend to be disenfranchised from administrative processes that govern environmental decisions, mirroring their larger social and political vulnerability.[11] Environmental jus-

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[7] *See infra* Part II.

[8] *See* WILLIAM A. SHUTKIN, THE LAND THAT COULD BE: ENVIRONMENTALISM AND DEMOCRACY IN THE TWENTY-FIRST CENTURY 128–41 (2000) (conceptualizing the emerging "civic environmentalism" as including environmental justice, along with a participatory process, community and regional planning, environmental education, industrial ecology, and sense of place).

[9] To be sure, that is not all environmental justice entails. Calls for environmental justice involve multifaceted claims, ultimately synthesizing aspirations for distributional and procedural equity, political accountability, and social justice into an untidy theoretical framework. *See* Robert D. Bullard, *Environmental Justice For All, in* UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 3, 10–11 (Robert D. Bullard ed., 1994). *See generally* Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 Envtl. L. Rep. (Envtl. L. Inst.) 10,681 (2000).

[10] *See* LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT app. at 167 (2001) (providing an annotated bibliography of studies and articles that document and describe the disproportionate impact of environmental hazards by race and income); Samara F. Swanston, *Environmental Justice and Environmental Quality Benefits: The Oldest, Most Pernicious Struggle and Hope for Burdened Communities*, 23 VT. L. REV. 545, 546–49 (1999); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 792–806 (1993).

[11] Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grassroots Re-*

tice advocates have thus challenged environmental decision-makers to account for the distribution of environmental benefits and burdens in environmentally vulnerable (i.e., disproportionately impacted and disenfranchised) populations by empowering populations with a meaningful role in assessing and managing environmental benefits and burdens in their communities. Ultimately, these advocates aim to equalize the influence of vulnerable communities in decision-making processes by involving them at the beginning and providing them with technical and other resources comparable to those used by risk producers.[12] Increasingly, regulators have responded to this challenge and promise to continue to do so.[13]

This Article examines the points of convergence and divergence between devolved collaboration and environmental justice.[14] The interest-

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sistance, and the Transformative Politics of the Environmental Justice Movement, 86 CAL. L. REV. 775, 811–26 (1998) (recounting experiences of a low-income African American community in Chester, Pennsylvania).

[12] *See id.*; Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103, 151–67. *See generally* Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992).

[13] *See generally* Sheila R. Foster, *Meeting the Environmental Justice Challenge: Evolving Norms in Environmental Decisionmaking*, 30 Envtl. L. Rep. (Envtl. L. Inst.) 10,992 (2000) (tracking the increasing entrenchment of environmental justice norms in environmental regulatory decisions by focusing on permitting decisions); Margaret Kriz, *Coloring Justice Green*, 33 NAT'L J. 2419 (2001) (noting that current EPA Administrator Christine Whitman considers environmental justice a "top priority" and has promised, among other things, to clear up the backlog of civil rights complaints that charge state and local government agencies with "unjustly allowing new smoke-belching factories to be built in already-polluted neighborhoods"). Moreover, the fact that "justice," like "efficiency," is not defined with precision has been of little consequence to regulatory reform efforts. *See* Eileen Gauna, *EPA at 30: Fairness in Environmental Protection*, 31 Envtl. L. Rep. (Envtl. L. Inst.) 10,528, 10,531 (2001) (noting that "the plea for 'efficiency' has sheparded significant regulatory initiatives" by EPA without a precise conception of that term, and noting similar efforts at regulatory reform under the rubric of environmental justice).

[14] Others have critically examined local, collaborative environmental decision-making from different perspectives. *See* Charles Sabel et al., *Beyond Backyard Environmentalism: How Communities Are Quietly Refashioning Environmental Regulation*, BOSTON REV., Oct.–Nov. 1999, at 4 (lauding the use of local, collaborative efforts as combining "the virtues of localism and decentralization and the discipline of national coordination," and including responses by, among others, DeWitt John, Daniel Farber, Daniel J. Fiorno, Cass R. Sunstein, and Lawrence Susskind). *See generally* DOUGLAS S. KENNEY, ARGUING ABOUT CONSENSUS: EXAMINING THE CASE AGAINST WESTERN WATERSHED INITIATIVES AND OTHER COLLABORATIVE GROUPS ACTIVE IN NATURAL RESOURCES MANAGEMENT (2000), *available at* http://www.colorado.edu/Law/NRLC/Publications/RR23.pdf (exploring collaborative groups and the merits of consensus-building from the perspective of natural resources management and its focus on science and interest group public policymaking); Rena I. Steinzor, *The Corruption of Civic Environmentalism*, 30 Envtl. L. Rep. (Envtl. L. Inst.) 10,909 (2000) (questioning whether civic environmentalism is a practical alternative to the current regulatory regime given the costs of implementation, particularly those associated with gathering information necessary to impose effective performance-based standards and technical support for local groups); Stephen M. Nickelsburg, Note, *Mere Volunteers? The Promise and Limits of Community-Based Environmental Protection*, 84 VA. L. REV. 1371 (1998) (examining community-based environmental protection from the

convergence of these two powerful currents has been a crucial element shaping the direction of environmentalism from the 1990s into the new century. There are now more voices than ever calling for the creation of democratic, sustainable communities and for a more comprehensive approach to environmental problems that address the connections between environmental, economic, and civic health.[15] Importantly, proponents of both devolved collaboration and environmental justice poignantly question the ability of the single-agency, single-media regulatory approach to address increasingly complex environmental problems, many of which involve uniquely local impacts or costs that are not considered by uniform national standards.[16] Both also yearn for regulatory reforms that will empower residents of communities with abandoned and contaminated industrial sites, polluted streams, clear-cut forests, and strip-mined land.

Yet, despite the interest-convergence of devolved collaboration and environmental justice, there are dangers lurking at their intersection. This Article argues that while devolved collaboration can theoretically ameliorate some regulatory inequities, it may also reproduce many of the deeper and troublesome aspects of current decision-making processes. In some contexts, use of devolved collaboration will add renewed legitimacy to racial and class distributional inequities, further entrenching them in the landscape of environmental decisions. Perhaps as importantly, devolved collaboration will introduce new equity problems in environmental decision-making by modifying current patterns of participation and representation in unforeseen ways. Like its predecessor approaches, this evolving model, thus far, is indifferent to (or innocent about) the social, structural, and institutional conditions necessary to realize its own promises, including its aspiration of more equitable decisions.[17] Without greater attention to these conditions—particularly the existence of social capital within communities seeking to form collaborative structures—devolved collaboration threatens to simply reinforce some of the regulatory dysfunctionality it seeks to displace.

This Article concludes that the movement toward devolved collaboration should best be regarded as the collective expression of a core set of normative principles—broad representation, deliberation, local empowerment, and equitable and sustainable outcomes—that can guide the shaping of environmental decision-making processes in a context-specific fashion. The normative commitments expressed by the widespread em-

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perspective of collective action theory).

[15] *See, e.g.*, SHUTKIN, *supra* note 8, at 89–141; Terry L. Anderson & Donald R. Leal, *Calling on Communities*, *in* FREE MARKET ENVIRONMENTALISM 143, 143–57 (2001); JULIA M. WONDOLLECK & STEVEN L. YAFFEE, MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT 3–21 (2000). *See generally* Robert W. Collin & Robin Morris Collin, *Sustainability and Environmental Justice: Is the Future Clean and Black?*, 31 Envtl. L. Rep. (Envtl. L. Inst.) 10,968 (2001).

[16] *See infra* Part II.

[17] *See infra* Part V.

brace of devolved collaboration can be realized through a variety of means, including conventional decision-making processes. Nothing inherent in devolved collaboration, either as a model or a practice guarantees the achievement of these principles. These normative principles can, however, be used to tailor a mix of decision-making mechanisms to specific environmental problems in particular ecological, social, economic, and political contexts.[18] A contextualized approach brings with it the additional virtue of preserving the accountability of centralized authorities for ensuring fidelity to these principles in specific contexts instead of leaving this task to unaccountable, fragmented local groups. Indeed, in some contexts devolved collaborative decision-making processes will thwart achievement of these principles. In other contexts, conventional decision-making processes might realize these principles far better than devolved collaborative structures would.

Part II of this Article traces the emergence of devolved collaboration from widespread dissatisfaction with both the substantive focus of environmental regulation and the processes through which regulatory decisions are made. Underlying this dissatisfaction is a set of decision-making norms arguably responsible for the regulatory inflexibility and inequities devolved collaborative efforts seek to ameliorate. Part III describes two active strands of devolved collaboration. The first strand is characterized by the formation of ad hoc, local groups convened to address natural resources management concerns. The second strand is characterized by more formal, structured community advisory committees convened around environmental land management and pollution control issues. Part IV explains the allure of devolved collaboration as a response to the regulatory shortcomings chronicled in Part II. Much of the promise of this devolved collaboration is tied to its twin elements. While collaboration—through its requirement of consensus—adorns the process with democratic legitimacy, devolution contains the potential for improved outcomes that flow from equitable representation, local knowledge, and geographically focused problem-solving. Part V questions whether these promises can be fully realized in communities where stakeholders are geographically dispersed, diffuse, or differently situated in terms of social capital. This Part posits that the most vulnerable communities—those lacking adequate social capital and material resources needed for meaningful participation—will continue to be disadvantaged in the distribution of environmental benefits and burdens in devolved collaborative processes. Part VI concludes on a cautionary note, urging policymakers to employ a contextualized assessment of the ecological, social, and political conditions under which devolved collaboration can be effective given the concerns articulated in Part V.

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[18] Similarly, such principles may be employed to judge the effectiveness of a particular decision-making process or outcome.

II. Paving The Way for Reform: Critiques of Conventional Processes

The emergence of devolved collaboration is rooted in widespread dissatisfaction with environmental decision-making processes. Critics from different political and ideological orientations question both the substantive focus of environmental decisions and the processes by which those decisions are made. Traditional top-down, command-and-control strategies have worked well for the first generation of environmental problems (such as controlling point source pollution and preserving of individual species) yet they have failed to deal with the current generation of environmental problems that are much more complex and diffuse (such as agricultural or other nonpoint source runoff and species habitat protection). Moreover, the administrative processes through which much of environmental law is enforced too often subordinate the concerns and values of less powerful, and in many instances local, interests to those of more powerful interests. To be sure, critiques of regulatory inflexibility and inequity are nested within a larger debate and agenda of governmental reform challenging many facets of public decision-making structures and processes.[19] The emergence of a devolved collaborative model of environmental decision-making can thus be seen as responsive both to the shortcomings of our current environmental protection regime and to a larger project of rethinking the ways in which decisions about public goods get made.

A. Regulatory Inflexibility and Its Normative Roots

A variety of both substantive and procedural criticisms surround traditional processes of environmental decision-making. Existing programs, particularly those relying upon command-and-control mandates, are considered too rigid and fragmented to deal with modern environmental problems.[20] Not only are permitting requirements fashioned under the single-agency, single-media regulatory framework frequently viewed as inflexible and even counterproductive, but also they are challenged as being unduly burdensome upon industry and as promoting a highly adversarial relationship by pitting the agency and applicant against one another (and often the public against both of them).[21] Similar complaints

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[19] For instance, there has been a growing debate about the efficacy of collaborative efforts among local governments to address certain economic, social, and ecological issues—such as land use, sprawl, and transportation—that transcend local borders. *See generally* Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 Geo. L.J. 1985 (2000).

[20] *See, e.g.*, John, *supra* note 4, at 10.

[21] *See, e.g.*, Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1, 14–16 (1997).

abound in the natural resources arena, where environmentalists lament the ineffectiveness of laws designed to protect fragile ecosystems, while landowners in rural and western areas protest laws that limit their property rights.[22]

Underlying many of these deficiencies, critics argue, is a host of regulatory tools and practices built upon utilitarian principles of welfare economics. Under this philosophy, rational policy-making requires decisions that produce "the greatest good, to the largest number, for the longest time."[23] Utilitarianism supports the widespread use of scientific and technical tools that distill environmental impacts and values to a common measure and that direct decision-making to those options that minimize aggregated costs and maximize aggregated benefits. One such tool is comparative risk assessment, which is at the core of many pollution control programs, including the cleanup of contaminated land under the Superfund program and the regulation of drinking water, air pollution, pesticides, and waste disposal.[24] Comparative risk assessment attempts to quantify, through the most current scientific data and knowledge, the magnitude and probability of harm to public health (and, to a lesser extent, the environment) posed by each type of regulated environmental contaminant. Regulators then reduce environmental risks to a common measure—quantitative measurements of risk—and structure society's response in a way that directs relatively more resources to problems with high risk measurements than to problems with low risk measurements.[25]

The corollary in the natural resources domain is cost-benefit analysis, a tool derived from the water development arena that suggests that society is best served by those projects that produce the highest net benefits. Regulators thought the best way to achieve this objective was through technical analysis that emphasized maximizing resource use

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[22] Nickelsburg, *supra* note 14, at 1374 (citing J. B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 20 U. COLO. L. REV. 555, 585–90, 632–37 (1995)).

[23] WONDOLLECK & YAFFEE, *supra* note 15, at 11 (quoting Gifford Pinchot, the first chief of the Forest Service). *See generally* SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY (1959).

[24] *See, e.g.*, Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562, 577–79 (1992). As Hornstein argues, reliance on utilitarianism comes from regulatory agencies' difficult tasks of administering statutes which follow different, and sometimes conflicting, policy paradigms. Agencies must deal with a political system in which the orderly administration of programs sometimes disintegrates into a regulatory bazaar, with legislators and administrative managers responding to whatever combinations of political or interest groups exert the most pressure. *Id.* at 576–77.

[25] Risk assessments that calculate expected losses are then used in three different approaches to environmental protection: health-based provisions that typically do not tolerate "any" significant risk to public health or welfare; technology-based provisions that do not tolerate risks that can be "feasibly" eliminated; and risk-benefit provisions that find intolerable those technologies, substances, or processes that pose "unreasonable" risk. *Id.*

subject to long-term sustainability constraints.[26] Cost-benefit analysis is also a contested regulatory tool in the pollution control context.[27]

This model of technocratic utilitarianism and the complex mathematics associated with quantifying and measuring the recognized variables presume that environmental and natural resources decision-making "is a technical task and that our goals and objectives can be met through the application of experts' specialized tools."[28] Even with extensive modern public participation requirements, decision-makers maintain substantial deference to the technocratic model by using public input to check the math rather than to question the structure of the underlying equations.[29] The process of reducing complex environmental and natural resource problems to strictly technical dimensions may further the efficient expenditure of resources and even bring about "optimal" environmental protection.[30] Exclusive or undue reliance, however, on such reductionist techniques as comparative risk analysis has led to a substantively narrow focus that dominates environmental decisions. This narrow focus is increasingly ill-suited to address many environmental and natural resource problems, which involve complex ecological and socioeconomic systems and transcend technocratic analysis.[31]

B. The Inequity of Utilitarianism

The utilitarianism tradition, so entrenched in law and environmental agency culture, raises several equity-related issues. Two issues are of primary concern. First is the observation that the utilitarianism/social welfare model does not account for distributional impacts. Converting costs, benefits, and risks into a common metric assumes that each is

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[26] WONDOLLECK & YAFFEE, *supra* note 15, at 13.

[27] *See generally* Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981 (1998) (pointing out that cost-benefit methodology, particularly the practice of discounting human lives, is problematic).

[28] Timothy P. Duane, *Community Participation in Ecosystem Management*, 24 ECOLOGY L.Q. 771, 772 (1997).

[29] WONDOLLECK & YAFFEE, *supra* note 15, at 13 (noting that even when significant public involvement mechanisms were built into the natural resource planning processes, such mechanisms were "created in the image of the technocratic model that was well entrenched in agency traditions").

[30] *See generally* Daniel Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495 (1999).

[31] *See, e.g.*, Kuehn, *supra* note 12, at 128 ("the almost obsessive nature of [quantitative risk analyses] that revolve around the difference between risks of one in 100,000 and two in 100,000 undoubtedly ignore equally important questions such as who are these persons who are at risk; what benefits will those who must bear the risk receive from this increased risk; what benefits will those who produce the risk enjoy; and is it really necessary to impose the risks on these or any other people"); Kathryn A. Kohm & Jerry F. Franklin, *Introduction* to CREATING A FORESTRY FOR THE 21ST CENTURY: THE SCIENCE OF ECOSYSTEM MANAGEMENT 3, 3 (Kathryn A. Kohm & Jerry F. Franklin eds., 1997) (pointing out the need for "appreciating the complexity of systems and managing for wholeness rather than for the efficiency of individual components" in forestry management).

"sufficiently fungible as to be compared, traded off, or otherwise aggregated by analysts."[32] Although considering net benefits or risks in isolation of their distribution may satisfy the standard of efficiency, consideration of costs and benefits without considering their distribution surely violates most notions of equity and justice. Environmental justice advocates have bemoaned the failure of utilitarian-based comparative risk analysis—specifically its focus on measuring aggregate environmental and health losses—to consider the distributional effects of environmental and health risks on subpopulations that may be disproportionately impacted by various environmental hazards.[33]

Many environmental issues, such as siting decisions, entail clearly different distributions of net benefits and costs (or risks), often along lines of geography, income, political power, and race.[34] A similar lack of congruence can be associated with programs reliant upon uniform regulatory standards that may impose social and economic costs on certain populations that are either unnecessary, excessive, or disproportionate in relation to the benefits obtained by those populations.[35] So too does centralized natural resources management yield disparities between those bearing the costs and those receiving the benefits, with many of the major costs borne by local populations.[36]

The other equity concern raised by the existing reliance on technocratic decision-making is its inadequacy to deal with the complex social, political, and ethical concerns embedded in many environmental and natural resource issues.[37] Technically trained decision-makers often lack both the skills and the legitimacy to make decisions that have ethical and value dimensions. For instance, while the experts tend to speak of and measure environmental and health risk in terms of probabilities and consequences, the public has its own "models, assumptions and subjective techniques (intuitive risk assessments), reflecting a broad and complex conception of risk that is not often as dependent upon quantification and classification as that of the experts."[38] Reliance upon technical decision-

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[32] Hornstein, *supra* note 24, at 585.

[33] *See, e.g.*, Kuehn, *supra* note 12, at 171; Foster, *supra* note 13, at 10,993.

[34] *See, e.g.*, Richard Lazarus, *Fairness in Environmental Law*, 27 ENVTL. L. 705, 712–15 (1997).

[35] *See, e.g.*, Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1260 (1977) (citing the example of uniform federal emission limitations on new automobiles, which impose high costs on rural areas while yielding few compensating benefits).

[36] *See generally* ROGER A. SEDJO, THE NATIONAL FORESTS: FOR WHOM AND FOR WHAT? 23 (PERC Policy Series, Issue No. PS-23, 2001).

[37] *See generally* ROBERT H. NELSON, PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT (1995).

[38] James Flynn & Paul Slovic, *Expert and Public Evaluations of Technological Risks: Searching for Common Ground*, 10 RISK 333, 336 (1999). Quantitative analysis tends to reduce diversely perceived risks to a measurable, comparable dimension, squeezing out unquantifiable aspects of risk that are important to the public. *See, e.g.*, Laurence H. Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66, 96–97 (1972); *see also*

making techniques allows environmental decision-makers to argue that difficult social and political questions are being resolved "scientifically."[39] However, most environmental decisions do not simply reduce themselves to matters of impartial judgment embodied in "a concrete problem-solving calculus," but are instead "inherently infused with value judgments."[40] To the extent that different perceptions about risk or the comparison of incommensurable values come into play in environmental decisions, it cannot simply be reduced to a single utility metric, be it scientific or otherwise, without significant loss to those values.[41] The diversity of public values demands consideration and weight in some way.[42]

C. *The Perils of Pluralism*

It has proven to be exceedingly difficult to accommodate diverse values and public input into forums emphasizing autonomous technical decision-making guided by principles of utilitarianism and welfare economics.[43] In theory, this challenge is at least partially addressed by the

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Hornstein, *supra* note 24, at 575 (writing that "EPA will emphasize those aspects of risk that its scientific bureaucracy has the tools to measure (expected losses) at the expense of less easily measured, but not necessarily less important, aspects of risk-bearing").

[39] Hornstein, *supra* note 24, at 567.

[40] Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 198 (1997); *see also* Hornstein, *supra* note 24, at 630 (arguing that "comparative risk analysis gives an undeserved assurance or scientific legitimacy to the inescapably collective (and political) process of establishing social policies and priorities on environmental problems"). *See generally* Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613 (1995).

[41] Duane, *supra* note 28, at 772 (noting that natural resource management agencies tend to emphasize commodity production to the detriment of emerging social and ecological values like sustainability); SUSTAINING THE PEOPLE'S LANDS, *supra* note 2, at xiv–xv (interpreting sustainability as calling for integration of the management of biological and ecological systems with their social and economic contexts, while acknowledging that management should not compromise the basic functioning of these systems).

[42] *See* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 782–97 (1994); Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3, 33 (2000).

[43] Douglas Kenney, Innovations in Forestry: The Controversy over Collaborative Planning and Management 1 (2001) (unpublished manuscript, on file with the Harvard Environmental Law Review) (attributing the discontent with federal planning processes in the natural resources arena among a broad spectrum of stakeholders to "a perceived inability of some parties, particularly local interests, to meaningfully participate in the development and implementation of management plans" and to the belief "that the traditional process encourages conflict at the expense of thoughtful deliberation, resulting in strained relationships and inadequate resource management outcomes"); HERBERT INHABER, SLAYING THE NIMBY DRAGON 56–59 (1998) (citing some of the features of the present command-and-control system for pollution management that have caused discontent among stakeholders, including the foregrounding of administrative or procedural issues rather than substantive concerns of the site neighbors, the postponement of public participation until major decisions have been made by the agency, the adversarial rather than consensual framework aimed at proving the other side wrong, highly complicated laws and regulations that reduce public participation, an overemphasis on science and technology, and a centralized system

requirement that environmental and natural resource decisions follow a tightly structured and open public process, consistent with the tenets of the Administrative Procedure Act of 1946.[44] In practice, however, this requirement is frequently manipulated into "announce and defend" decision-making, in which meaningful outside input is effectively stillborn.[45] Centralized bureaucrats, while promising meaningful participation, too often make decisions without full information about their true costs and benefits.[46] Even when good information from local impacted communities is requested and received, the regulatory and bureaucratic maze through which such information must pass to make a difference in ultimate decisions creates disincentives for gathering such information in the first place.

Equally problematic in many policy areas is the nearly complete erosion of administrative discretion under the pressures of interest group politics, or "pluralism."[47] Functioning much like a market, the pluralist model of administrative decision-making aggregates the preferences of all interest groups to reflect, on balance, a mix of predominating preferences. Neither a thoughtful public deliberation nor an impartial, independent scientific analysis, the pluralist model generates outcomes that are frequently suspect, especially when complex environmental problems are concerned.[48]

Perhaps the most troubling aspect of pluralism, however, involves the manner in which preferences are inequitably aggregated. Political and economic power and technical ability are the currencies of pluralism. Parties lacking these resources lack access and influence, and they can expect to have their preferences systematically devalued or completely excluded.[49] For instance, many disadvantaged (economically, socially, or politically) communities complain of being excluded from environmental

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that distorts information and suppresses independent evaluation).

[44] Pub. L. No. 404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–559, 701–706 (2000)).

[45] This framework "fosters accountability only in the form of post-decision ratification, rather than meaningful incorporation of public input." Jones, *supra* note 5, at 26.

[46] *See generally* Foster, *supra* note 13.

[47] Richard B. Stewart has outlined the evolution of this model and argued that by the mid-1970s, the pluralist understanding was widely shared by judges, legislators, practitioners, and legal commentators. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1713 (1975).

[48] *See, e.g.*, Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 25–28 (1998). *See generally* Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53 (1996); BRUCE A. WILLIAMS & ALBERT R. MATHENY, DEMOCRACY, DIALOGUE, AND ENVIRONMENTAL DISPUTES: THE CONTESTED LANGUAGE OF SOCIAL REGULATION (1995).

[49] *See* Gauna, *supra* note 48, at 36–37 (noting that under the pluralist model, since "[p]references are defined by the relative power of self-interested subjects . . . they may be distorted by existing inequalities, poorly construed as a result of exclusion and unequal political clout or prove simply unethical.").

land use and natural resource planning processes because they are often not aware that a process is underway or because the logistics of the process effectively exclude them from participating.[50] Even when disadvantaged communities are formally included early on in the process, they tend to be limited in their ability to participate meaningfully based on the lack of expertise, information, and resources.[51] In this way, certain preexisting social disadvantages can interact with pluralistic decision-making processes to produce even more severe inequalities.

It is now widely recognized that pluralism is not an ideal model for resolving highly contentious public issues in a way that lends legitimacy to the ultimate decision. A better approach would be one that provides "meaningful" public participation, a requirement defined to mean a deliberative process whereby stakeholders engage in an egalitarian discourse about what outcome best serves the common good of the affected community. Such a process would not simply equate the "public interest" with the aggregate self-interested, private preferences of its participants. Nor would such an approach naively assume that a simple tallying of benefits and costs would, by itself, be sufficient. Rather, the ideal process would seek to bring together citizens to create the common good, as opposed to discovering it through preexisting preferences.[52]

III. Devolved Collaboration: The Changing Landscape of Environmental Decision-Making

From California habitats to Massachusetts toxics, the United States is in the midst of a fundamental reorientation of its envi-

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[50] For instance, the initial decision-making phase—during which the agency develops a proposal, reviews a permit application, or examines a variety of planning or remedial options—often involves some consultation with organized interests with whom the agency has an ongoing relationship. Broader public input is generally not sought until the agency has made a preliminary decision on the particular matter at hand. Once a preliminary decision has been made, of course, considerable agency resources have been expended and many alternative actions and choices are foreclosed. *See, e.g.*, Council on Environmental Quality, The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years 11 (1997).

[51] The most disadvantaged, and most affected, individuals and communities are thus ill-equipped and hence unable to challenge both the technical data underlying the decisions and the numerous assumptions and judgments made by the agencies in the process. O'Neill, *supra* note 42, at 32. This disparity of resources can be even more pronounced in socioeconomically vulnerable communities (particularly low-income minority communities) due to fewer technical resources, less access to decision-makers, and less education. Kuehn, *supra* note 12, at 131–33.

[52] Participants would be expected to set aside, and revise, their own preferences in the interest of finding shared values. While participants would be expected to, and would, express private preferences, these preferences would be subjected to critical examination and reasoned debate. Such debate hopefully would move participants beyond their own self-interests toward consensus or, at the least, bring forth alternative perspectives, additional information, and better decisions. *See* Gauna, *supra* note 48, at 20–21.

> ronmental regulation, one that is as improbable as it is unremarkable. Minimally, the new forms of regulation promise to improve the quality of our environment. At a maximum, they suggest a novel form of democracy that combines the virtues of localism and decentralization with the discipline of national coordination.[53]

The embrace of devolved collaboration as a decision-making norm and practice occurs, importantly, at a time when alternative dispute resolution processes to resolve environmental disputes have firmly taken root.[54] Devolved collaboration builds upon and expands these previous collaborative efforts by promoting widespread, independent participation by local groups to craft comprehensive solutions to difficult environmental concerns on a geographically-focused scale.[55] Pursuant to this approach, public and private stakeholders collaborate to identify concerns, establish priorities, and design and implement holistic (i.e., multimedia) solutions to a broad spectrum of environmental problems faced within a specific community or geographical region. The marvel of these efforts has been the participants' ability to overcome collective action problems regarding environmental and natural resources management dilemmas, such as those illustrated in Garrett Hardin's "tragedy of the commons."[56] When such obstacles are overcome, local collaborative

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[53] Sabel et al., *supra* note 14, at 4.

[54] Environmental dispute resolution has moved through several distinct phases since the first reported efforts in the early 1970s. Both mediation and negotiation are now well-accepted methods to resolve both policy level and site-specific disputes. *See* Lawrence Susskind, *Environmental Mediation: Theory And Practice Reconsidered in* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 495, 495–500 (3rd ed. 1999). *See generally* J. WALTON BLACKBURN & WILLA MARIE BRUCE, MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE (1995); LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION (1984).

[55] This scale may or may not respect the administrative boundaries or jurisdiction of a particular public agency or fall within a particular statutory mandate. Thus, conservation strategies for wide-ranging species might occur at the bioregional level (e.g., the Sierra Nevada or the spotted owl region) to encompass an entire range of species; strategic planning may occur at a "large landscape" level (e.g., the Columbia River Basin) following ecological and political or social boundaries; implementation planning may occur at a "small landscape" level (e.g., a watershed) "where actions, cumulative effects, and performance can be monitored." SUSTAINING THE PEOPLE'S LANDS, *supra* note 2, at xxvii.

[56] *See, e.g.*, Nickelsburg, *supra* note 14, at 1377–96 (observing that there are many examples in the collaborative literature of voluntary, collaborative efforts that overcome collective action problems). In 1968, Hardin described the dilemma of the overgrazed commons, whereby each rancher, behaving as a rational economic actor, would try to keep as many cattle as possible on the commons. The commons—air, water, wildlife—is thus on a collision course with the dynamics of human behavior that rest on individually-based rational choices. As Hardin says:

> Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.

groups have demonstrated that "the coercive power of the state is not always needed to ensure that individual behavior conforms to community interests."[57] As illustrated below, evolving local collaborative efforts demonstrate that such successes are built upon common interests and values, including connectedness to a "place" and social capital (credibility, trust, and respect) among its participants.[58]

There are at least two recognizable strands of devolved collaboration currently in practice. The first involves mostly ad hoc local groups that are concerned with diverse issues in natural resources planning and management. The second features more formalized, local working groups that focus on land use and pollution control decisions. Both strands expand the influence of, and demand deeper participation by, public and private local actors in environmental and natural resource decisions. Yet neither strand requires a complete abdication of government authority and responsibility over those decisions. Accountability to central government decision-makers is preserved through a multilateral relationship whereby local actors supplement central regulatory authorities, which in turn support local efforts.[59] In both strands, regulators (and sometimes legislators) expect to, and often do, use the proposals and recommendations of community-based participants to manage natural resources in accordance with local values, reformulate minimum performance standards, or impose additional conditions and monitoring requirements on regulated sources.

Garrett Hardin, *The Tragedy of the Commons,* 162 SCIENCE 1243, 1244 (1968). This dilemma led Hardin and others to conclude that the only solution to these problems was a strong, centralized authority ("mutual coercion, mutually agreed upon") that would make protective rules and enforce them. *Id.* at 1247.

[57] KENNEY, *supra* note 14, at 33; *see also* Anderson & Leal, *supra* note 15, at 144 (noting that successful community-based resource management "challenges the assumption that users are locked into a destructive pattern of competition that invariably leads to resource abuse" and that "[c]ommunity management shows how the commons can be self-regulated").

[58] Nickelsburg, *supra* note 14, at 1393–95 (explaining that "[i]t is unclear exactly how these factors operate—whether they merely reduce the transaction costs of misperception and mistrust, or whether they underlie a realignment of stakeholder interests that enables completely new bargaining solutions to arise").

[59] The CBEP initiative, for example, structures the role of EPA as promoting and "capacity-building" for community-level environmental protection efforts. *See* OFFICE OF THE ADMINSTRATOR, EPA, EPA-100-R-97-003, PEOPLE, PLACES AND PARTNERSHIPS: A PROGRESS REPORT ON COMMUNITY BASED ENVIRONMENTAL PROTECTION 10 (1997); *see also* Sabel et al., *supra* note 14, at 4 (noting that federal, or central, government authorities continue to "regulate" in the sense that they ensure that "local units live up to their commitments by coordinating their activities, monitoring their performance, pooling their experiences, and enforcing feasible standards that emerge from their practice").

A. Ad Hoc Collaborative Processes: Watershed Initiatives and Forestry Partnerships

Recent years have seen a proliferation of collaborative ad hoc groups such as "watershed initiatives" and "forestry partnerships."[60] These initiatives and partnerships are groups of self-directed public interests (governments and natural resource agencies) and private stakeholders (local residents, landowners, and interest groups) assembled to address mutual natural resource concerns (e.g., water quality, biological restoration, forest health) at physically relevant geographic scales (e.g., watersheds).[61] Many of these groups have successfully developed, and in some cases implemented, detailed plans both to protect vulnerable natural resources, such as watersheds and forests, and to allow local interests to utilize those resources in ways that promote the economic and social sustain-ability of the surrounding communities. In bringing together traditional adversaries (e.g., landowners, resource extractors, environmentalists, and federal agencies) to seek solutions of mutual benefit, these ad hoc collaborative partnerships strive to elevate the pursuit of practical, multi-stakeholder plans above the conflict, delays, and administrative red tape so characteristic of mandated planning processes and regulatory programs.

Many of these efforts are found in the West, particularly in communities where the ties between economies and landscapes remain strong and where an abundance of federal public land ensures a complex resource management environment.[62] Watershed initiatives, for example, frequently focus on the desire to accommodate local water use practices with environmental protection values and, more directly, federal environmental regulations associated with the Endangered Species Act and the Clean Water Act.[63] The decline of salmon fisheries and the subsequent listing of many runs as endangered have made the Pacific Northwest, in particular, an extremely active laboratory in devolved collaboration.[64] Among the best-known western watershed initiatives are the Henry's Fork Watershed Council in Idaho, the Upper Clark Fork River

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[60] *See generally* WONDOLLECK & YAFFEE, *supra* note 15.

[61] Detailed inventories have been produced by several authors, including DOUGLAS KENNEY ET AL., THE NEW WATERSHED SOURCE BOOK (2000), *available at* http://www.colorado.edu/law/NRLC/Publications/watershed.html (on file with the Harvard Environmental Law Review), and STEVEN YAFFEE ET AL., ECOSYSTEM MANAGEMENT IN THE UNITED STATES (1996). This discussion primarily draws from KENNEY ET AL., *supra*; Duane, *supra* note 28; Nickelsburg, *supra* note 14; and EPA, *Community Based Approaches, at* http://www.epa.gov/ecocommunity (last modified Apr. 25, 2002) [hereinafter *Community Based Approaches*] (on file with the Harvard Environmental Law Review).

[62] *See generally* WONDOLLECK & YAFFEE, *supra* note 15.

[63] *See generally* A. Dan Tarlock, *Putting Rivers Back in the Landscape: The Revival of Watershed Management in the United States*, 6 HASTINGS W.-NW.J. ENVTL. L. & POL'Y 167 (2000).

[64] *See id.* at 168.

Basin Steering Committee in Montana, and the Coquille Watershed Association in Oregon.[65]

Forestry partnerships, meanwhile, are particularly common in regions where economic and social forces encouraging timber harvesting conflict with environmental values.[66] One example of a forestry partnership is the Applegate Partnership in southern Oregon, a collaborative group working to move beyond the polarizing conflict between environmentalists and the timber industry concerning the use of old-growth forests.[67] Other examples of devolved collaboration with a predominantly land-use focus include the development of the Inimim Forest management plan within the Yuba River Watershed in northern California and the work of the Malpai Borderlands Group, a collaborative group concerned with an ecosystem straddling the border between southern Arizona and New Mexico.[68] The Inimim Forest plan is aimed at overcoming the conflict between "traditional land and resource management practices and emerging social values that were not adequately reflected" in the Bureau of Land Management process.[69] Specifically, the plan seeks to support value-added timber manufacturing in a responsible way that would provide jobs in the local community. The Malpai effort, similarly, is an attempt to respond to the "decline in ranching profitability" and the "ever-increasing housing demands of neighboring urban centers."[70]

Perhaps the best-known and most controversial experiment in devolved collaboration is a forestry partnership called the Quincy Library Group ("QLG").[71] QLG comprises local civic, business, and environmental leaders from Quincy, California, who have been meeting since 1993 in the local library to discuss solutions to the "timber wars" in the nearby Plumas National Forest.[72] The group has worked for several years to devise and implement a management plan promising to protect environmental resources, sustain the local timber industry, and reduce the threat of a catastrophic forest fire.

The forest controversy coalesced in the early 1990s and pitted various stakeholders against one another in the region. The immediate negotiations between the founding members of QLG stemmed from legal

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[65] *See generally* KENNEY ET AL., *supra* note 61.

[66] *See, e.g.*, Nickelsburg, *supra* note 14, at 1396–1406.

[67] *Id.* at 1396–1403.

[68] *Id.* at 1402–06 (describing Malpai Borderlands Group); Duane, *supra* note 28, at 780–84 (describing Inimim Forest effort).

[69] Duane, *supra* note 28, at 780.

[70] Nickelsburg, *supra* note 14, at 1403.

[71] One of the most comprehensive case studies of QLG is by Timothy Duane. *See generally* Duane, *supra* note 28. Also useful is Lawrence Ruth, *Conservation on the Cusp: Reformation of National Forest Policy in the Sierra Nevada*, 18 UCLA J. ENVTL. L. & POL'Y 1 (1999). The following recounting of QLG is based primarily on Duane's account.

[72] QLG met in the public library because it was "the only place in Quincy where they were guaranteed not to scream at each other." Editorial, *Who Should Determine the Fate of a Forest?*, S.F. CHRON., June 15, 1997, at 8.

challenges brought by local environmental activists that successfully delayed timber sales throughout the national forests of the Sierra Nevada. These legal challenges had the effect of protecting the California spotted owl but had a devastating effect on the economy of Quincy, which depends heavily on the timber industry. At the same time, the U.S. Forest Service had allowed the over-cutting of the forest in the area, creating false expectations about the sustainability of harvest levels, which led to a very high unemployment rate once the harvesting stopped. Additionally, there was a rising timber demand as the nation came out of a recession, so socioeconomic factors put pressure on the local timber industry to produce or lose large contracts to other areas.[73] QLG was founded upon the premise that the region needed to move beyond divisive conflict, undue outside control (by federal agencies, federal laws, and national interest groups), and narrow problem-solving strategies. Rather, the situation called for a locally-generated forest management plan that was comprehensive in scope and design.

QLG developed a plan with provisions for the preservation and restoration of the forest ecosystem as well as the sustainability of the surrounding community and the economy.[74] However, the group found it impossible to enact the plan through the National Forest process outlined in the National Forest Management Act and administered by the U.S. Forest Service. Consequently, QLG took the unusual step of introducing the proposal as a bill in Congress. After a turbulent struggle, the Herger-Feinstein Quincy Library Group Forest Recovery Act of 1998 passed.[75]

The success of groups like QLG has come to represent the "triumph of local initiative and collaborative problem-solving"[76] and has fueled the movement toward devolved collaboration in the natural resources arena. Supporters of the movement applaud the tremendous energy, creativity, and knowledge garnered by members of groups like QLG to take control of a natural resource that was becoming the victim of a dysfunctional federally-controlled management and planning framework and political

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[73] A final consideration was that the dense forest in the area provided substantial fuel for forest fires, and, following a particularly devastating fire in 1994, the plan was expanded to include a proposal for cutting fuel breaks into the forest. Duane, *supra* note 28, at 787–88.

[74] The proposed management plan involved an ambitious five-year forest management pilot project encompassing all of Lassen and Plumas National Forests and part of Tahoe National Forest. The plan emphasized preserving larger trees, harvesting small-diameter trees to supply a local mill, developing fuel management techniques, and restoring certain habitats. *Id.* at 784–89.

[75] Pub. L. No. 105-277, § 401, 112 Stat. 2681-305, 2681-305 to 2681-310 (codified at 16 U.S.C. § 2104 (Supp. V 1999)). *See* Duane, *supra* note 28, at 784.

[76] Kenney, *supra* note 43, at 1; *see also* WONDOLLECK & YAFFEE, *supra* note 15, at 71–78 (championing collaborative processes in the natural resources arena, pointing to the example of QLG and other success stories). *See generally* Nickelsburg, *supra* note 14 (relating similar, but less dramatic, case studies of ad hoc groups attempting to resolve natural resources conflicts).

gridlock resulting from conflicting local interests. The wild "success" of a renegade coalition from this small town has certainly made the QLG matter a key concern for future environmental policy. In many respects, QLG is highly atypical of other community-based collaborative groups in its ambition, controversy, and influence. That, however, is what makes it so useful as a case study.[77] Whether or not QLG represents the future of devolved collaboration and whether or not it should be the future are both questions of considerable importance for the future of environmental regulation and policy-making.

B. Structured Collaborative Processes: Community Advisory Groups

Another prominent strand of devolved collaboration reflects a more structured type of collaborative decision-making process: community "advisory" committees. Increasingly, but not exclusively, used as part of pollution control and environmental land management disputes, these committees are generally set up by statutory or regulatory mandate to bring together public and private interests to deliberate on issues such as the siting of hazardous waste facilities and the clean up and redevelopment of contaminated land.[78] These local, site-specific committees are an outgrowth of regulatory negotiation and policy-level advisory committees, which have been used at the national level for years.[79] In contrast to

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[77] QLG's success, if mimicked by other local collaborative groups, successfully effectuates a dramatic step away from the centralized and national character of natural resources planning. Indeed, its insular, local decision-making became its greatest source of controversy. Yet, this type of local influence is part of the allure of devolved collaboration. Therefore, with its extremely local character, QLG provides cautionary lessons and raises important questions about what forms of collaborative models will best achieve sound environmental and natural resource policy-making.

[78] *See* Sheila Foster, *Public Participation*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 185, 225 n.149 (Michael B. Gerrard ed., 1999) (noting that in the permitting process for waste facilities, for example, at least a dozen states mandate local advisory committees to address such issues as the social, economic, and environmental impact of the proposed facility, possible compensation to the community hosting the facility, and community monitoring of the facility); Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, *in* BROWNFIELDS LAW & PRACTICE: THE CLEANUP AND REDEVELOPMENT OF CONTAMINATED LAND 31-1, 31-12 to 31-17 (Michael Gerrard ed., 1999) (noting the states and federal agencies that have used site-specific citizen advisory boards in decisions about the clean up and redevelopment of contaminated land). Additionally, many federal agencies, such as DOE and the Department of Defense, regularly use such committees as part of decision-making on how to clean up and redevelop the nation's nuclear weapons production facilities and contaminated or closed military bases. *See* Thomas C. Beierle & Rebecca J. Long, *Chilling Collaboration: The Federal Advisory Committee Act and Stakeholder Involvement in Environmental Decisionmaking*, 29 Envtl. L. Rep. (Envtl. L. Inst.) 10,399, 10,400 (1999).

[79] *See generally* John S. Applegate, *Beyond the Usual Suspects: The Use of Citizen Advisory Boards in Environmental Decisionmaking*, IND. L.J. 903, 922, 925–26 (1998) (reviewing the short history of public use of citizen advisory boards and the lengthy history of federal government use of advisory boards of experts); *see also* Beierle & Long, *supra* note 78, at 10,400–01 (discussing difference between "expert," "policy-level," and "site-specific" advisory committees and giving examples of each).

the "consultative" function of expert advisory committees[80] and some policy advisory committees,[81] the "collaborative" function of local advisory committees involves "active deliberation" and "an emphasis on consensus among members."[82] More than an exchange of ideas and information between governmental officials and nongovernmental stakeholders, these consensus-based processes involve "finding areas of common ground and shared understanding among stakeholders that form the foundation of outcomes to which all stakeholders can agree."[83]

Site-specific advisory committees have several features in common. First, they are appointed to address environmental, social, or economic issues pertaining to a particular site. In the siting context, an advisory committee may be directed to ascertain the environmental, social, and economic impact a particular facility will have on the host community, negotiate compensation for the host community, or develop permit conditions and monitoring requirements.[84] Rarely do such committees have the authority to decide whether or not to grant the permit, which is a decision that the permitting agency retains in its jurisdiction.[85] In the clean up and redevelopment context, an advisory board might be directed to develop recommendations for reuse of the contaminated land, to help prepare an environmental impact report for the reuse plan, and to propose clean up standards consistent with the planned reuse of the land.[86]

One of the most systematic uses of an advisory committee in the clean up context involved the remediation of a former Nuclear Weapons Complex facility in Fernald, Ohio.[87] Established by the Department of Energy ("DOE"), the advisory committee (formally called a "task force") issued consensus recommendations on future use and residual risk levels at the site, as well as waste disposition and clean up priorities.[88] For example, the most intensive future uses of the site (residential and agricultural) were prohibited, and residual risk levels were set to protect the aquifer from future contamination while at the same time minimizing surface disruption and waste generation. The committee further decided to

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[80] These committees are comprised of experts and are generally used to provide technical advice and peer review on issues relevant to the function of federal agencies. An example is the twenty-year-old Science Advisory Board at the EPA. Beierle & Long, *supra* note 78, at 10,400.

[81] Policy-level committees provide substantive input on the value-laden, social dimensions of policy issues of national concern. *Id.* at 10,401. Examples of such committees are those engaged in "policy dialogues," which bring stakeholders together for input on policy issues. *Id.* These committees are generally composed of professional representatives of environmental, public interest, and industry groups. Some common policy committees are EPA's Common Sense Initiative Council and Clean Air Act Advisory Committee. *Id.*

[82] *Id.* at 10,402.

[83] *Id.*

[84] Foster, *supra* note 78, at 205–06.

[85] *See id.* at 206.

[86] *See* Applegate, *supra* note 79, at 929–33.

[87] *Id.*

[88] *Id.* at 931.

move the most dangerous waste off-site, while storing high-volume, low-risk material in an engineered on-site facility.[89]

Second, the breadth and depth of representation on these committees is tightly regulated by the legislation or regulation establishing them. Advisory committees seek consensus among a diverse membership of representatives from all, or at least most, potential stakeholders. Thus, such a committee might include a specific number of representatives from federal, state, and local agencies, environmentalists concerned with quality of life issues, conservation proponents, local businesses, property owners, and environmental justice advocates.

For example, the Fernald, Ohio, advisory committee discussed above consisted of seventeen members and included local and national environmental groups, neighbors of the site, township and county government officials, representatives of major trade union councils at the site, and local business liaisons with important constituencies (e.g., environmental activists, labor, and local government). Others were chosen more for their expertise or experience on the relevant issues (e.g., engineers and health professionals).[90] The senior site officials of DOE, EPA, and Ohio EPA were nonvoting members.[91]

Third, most advisory committees are eligible to receive technical assistance, usually in the form of grants for hiring consultants, lawyers, and other necessary personnel. All advisory committee members have access to the same information and documents, ideally in a form accessible and understandable to all members.[92] Technical assistance provisions exist out of recognition that local citizens might not always possess the knowledge and expertise to deliberate effectively with other interests on the committee. Having information and technical resources at their disposal makes it possible for a group of otherwise unsophisticated citizens to influence environmental decisions, in part by signaling errors made by technical experts or political leaders, or demonstrating that substantial public opposition exists.[93]

Local advisory boards generally embrace a deliberative ideal, "meaning that the essential activities are learning about the issues, candidly discussing reasons for and against various alternative solutions, and

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[89] *Id.*

[90] *Id.* at 930.

[91] Applegate, *supra* note 79, at 930–31.

[92] Such information may include detailed analysis of the potential environmental and health effects of proposed alternatives, the limitations and uncertainties in risk, and the economic, social, and political costs and benefits of various alternative remedial options. *Id.* at 942.

[93] *See generally* Frances M. Lynn & Jack D. Kartez, *The Redemption of Citizen Advisory Committees: A Perspective From Critical Theory*, *in* FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE 87 (Ortwin Renn et al. eds., 1995).

striving to reach a consensus resolution."[94] Ideally, advisory committee discussions result in a consensus recommendation to the sponsoring agency about the outcome that is in the best interest of the community. However, "even if consensus cannot be reached, a successful citizens advisory board can narrow areas of disagreement, help affected parties recognize others' concerns and their bona fides, bring forward alternatives that had not previously been considered, and (if nothing else) elucidate issues that remain to be resolved."[95]

IV. The Promise of Devolved Collaboration

Devolved collaboration promises, either explicitly or implicitly, a number of improvements aimed at alleviating the inflexibility and inequity associated with conventional environmental decision-making processes. First, devolved collaboration promises a deliberative partnership between public and private citizens, as well as between traditional adversaries among private stakeholders. These partnerships will entail broader representation of interests in all stages of the decision-making process, along with more egalitarian influence. Decentralizing decision-making to local levels, it is hoped, will engender deep civic participation in environmental decisions among those most impacted by such decisions. Second, devolved collaboration promises to expand the range of values and expertise available to the decision-making process. Communities that are closest to the problem will be recognized as providing an important type of expertise and knowledge to the process. This expertise will then facilitate better and more creative solutions to environmental problems. Third, devolved collaboration promises a more deliberative process. Public and private stakeholders are expected to come together to find common solutions for mutual problems, allowing them not only to deliberate actively in achieving "long-term ecosystem health" in their communities, but also to foster linkages between socioeconomic prosperity and environmental well-being.[96]

These promises flow directly from the twin elements of "devolved collaboration." Collaborative decision-making is the vehicle through which greater representation and, ultimately, legitimacy will flow to its outcomes. Devolution of decision-making influence to geographically defined actors will further bestow the process with the necessary local expertise and input to improve those outcomes.

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[94] Applegate, *supra* note 79, at 921.

[95] *Id.*

[96] *Community Based Approaches*, *supra* note 61. EPA's CBEP Initiative, for example, aspires to "integrate[ ] environmental management with human needs," consider "long-term ecosystem health," and "highlight[ ] the positive correlations between economic prosperity and environmental well-being." *Id.*

A. Consensus and Democratic Legitimacy

Advocates of collaborative decision-making processes invariably cite its normative appeal—namely, its promise of democratic legitimacy.[97] Central to this normative claim is the requirement of consensus—getting diverse interested parties to agree with one another on solutions to their disputes or common problems.[98] Consensus-based decision-making is touted as a nonhierarchical process that allows each participant to veto a majority decision so that all interested parties have equal power in the decision-making process.[99] Deliberation and consensus-building among participants can be aided by mutually agreed-upon procedural rules, facilitators, and work groups.[100]

The interactive nature of deliberation is the mechanism by which citizens will not only reach consensus on questions of the public good, but act on it in ways that bring about better and more legitimate decisions. Public and private stakeholders are expected to come together to find common solutions to mutual problems. Akin to the New England town meeting, stakeholders meet and openly discuss their visions for the resolution of the problem. This visioning process allows each stakeholder or community member to "take advantage of the breadth and depth of ideas within the community" and "ensure that the initial proposals are shaped by all affected members."[101]

The resulting consensus is said to be superior to conventional decision-making methods for many reasons, including the ability to produce

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[97] *See generally* Judith E. Innes, *Planning Through Consensus Building: A New View of the Comprehensive Planning Ideal*, 62 J. AM. PLAN. ASS'N 460 (1996); Lynn & Kartez, *supra* note 93; Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000).

[98] LAWRENCE SUSSKIND ET AL., CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 6 (1999); *see also* Negotiated Rulemaking Act, 5 U.S.C. § 562 (1994) (defining consensus as a "unanimous concurrence" of the interested parties).

[99] Judith Innes has articulated well the elements of consensus-building processes:

> Consensus building has emerged parallel to the idea of "communicative rationality." . . . A decision is communicatively rational to the degree that it is reached consensually through deliberations involving all stakeholders, where all are equally empowered and fully informed, and where the conditions of ideal speech are met (statements are comprehensible, scientifically true, and offered by those who can legitimately speak and who speak sincerely). Communicatively rational decisions, then, are those that come about because there are good reasons for them rather than because of the political or economic power of particular stakeholders.

Innes, *supra* note 97, at 461; *see also* David N. Pellow, *Negotiation and Confrontation: Environmental Policymaking Through Consensus*, 12 SOC'Y & NAT. RESOURCES 189, 189–90 (1999).

[100] *See, e.g.*, WONDOLLECK & YAFFEE, *supra* note 15, at 108–15.

[101] OFFICE OF POLICY, PLANNING, AND EVALUATION, EPA, EPA-230-B-96-003, COMMUNITY-BASED ENVIRONMENTAL PROTECTION: A RESOURCE BOOK FOR PROTECTING ECOSYSTEMS AND COMMUNITIES 2-10 (1997), *available at* http://www.epa.gov/ecocommunity/book.zip.

more stable decisions.[102] Once a consensus is achieved, it becomes difficult for participants to reject the collective result. Instead, decisions reached by consensus are expected to enjoy higher compliance rates, as parties involved in the process are more likely to follow through with decisions in which they were involved.[103] The acceptability of the decision to all participants adorns consensus-based decisions with an aura of legitimacy that is notably lacking in more paternalistic processes, such as "announce and defend" decision-making, and in the pseudo-market framework of pluralism.

B. Devolution and Improved Outcomes

Another benefit of devolved collaboration pertains to the geographic locus of decision-making. Devolved collaborative efforts seek to coordinate the mandates of national environmental laws with the creativity of local solutions that recognize the unique ecology, economics, and demographics of the places in which these problems reside. For example, while local and regional land use practices and urban sprawl fall outside of traditional environmental regulation, devolved collaboration will, theoretically, allow impacted communities to "go beyond the narrow jurisdiction of environmental law to devise measures aimed at achieving common goals like open space protection and public access to waterfronts and parks, while encouraging investment in urban centers and mass transit."[104] By moving beyond a focus on individual outputs, such as timber production or pollution emission levels from smokestacks, and instead adopting a systems approach to environmental health and natural resources management, devolved collaboration promises improved out-

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[102] According to proponents, consensus-based processes purportedly offer many advantages over traditional decision-making processes, including saving the public money, producing quicker results than conventional dispute resolution methods, and helping to free up the heavily burdened dockets of the nation's judges. DOUGLAS J. AMY, THE POLITICS OF ENVIRONMENTAL MEDIATION 106 (1987). Several authors critically review these claims. *See generally id.*; GAIL BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE (1986); KENNEY, *supra* note 14, at 41–48; Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997).

[103] *See, e.g.*, Freeman, *supra* note 21, at 23 (writing that "parties are thought to be more likely to implement rules produced by a consensus in which they are a part"). *See generally* Freeman & Langbein, *supra* note 97 (reviewing empirical evidence that indicates consensus-based negotiation increases legitimacy—defined as the acceptability of the regulation to those involved in its development—and that this legitimacy benefit flows, in significant part, from participation in the process and the ability to affect the outcome). However, critics of consensus-based processes have called this assumption into question. *See generally* Coglianese, *supra* note 102 (questioning such claims based on empirical evidence suggesting that environmental regulations developed using consensus-based processes have resulted in more litigation than have comparable regulations promulgated using other forms of public participation); AMY, *supra* note 102 (reviewing similar claims in the environmental dispute resolution context).

[104] SHUTKIN, *supra* note 8, at 132.

comes. In the natural resources management area, this systems approach is referred to as "ecosystem management," whereby the focus of management "shifts from an output focus under multiple use to a process or condition focus . . . . Thus, the objective of ecosystem management is not the output of the forest factory, but rather the condition of the forest factory itself," a focus that demands more than scientific or technical measurements.[105]

This substantively broader, but geographically narrower, focus of environmental decision-making is anchored in the recognition that many environmental problems do not respect existing political or jurisdictional boundaries, particularly of federal regulatory authorities. Instead, new concerns that uniquely define geographic boundaries require mechanisms for linking the activities of different agencies, governments, and private stakeholders. This recognition has been increasingly evident to policymakers over the years and thus has not surprisingly become an important aspect of various reform efforts in many contexts. For instance, recent years have seen an increasing use of regional collaborative efforts among local governments to address economic, social, and ecological issues—such as land use, sprawl, and transportation—that transcend local borders.[106] This "new regionalism" supports limited-purpose regional governance structures that do not completely supplant local governments, but allow for the management of mutual regional concerns in a more efficient manner than if these concerns were left up to the fragmented local governments that make up a particular region. Regionalism has also made steady, if not spectacular, progress as an organizing principle in many federal and state natural resource agencies.[107] Rather than formal consolidations or reorganization of agencies, reform often focuses on finding novel and frequently informal means of interagency and interjurisdictional cooperation. Such regional mechanisms promise more efficient and effective resource management and, largely due to the emphasis on collaborative decision-making, require minimal restructuring of formal authorities, responsibilities, and budgetary arrangements.

Devolved collaborative efforts promise to capitalize on the insights of regionalism and its varied benefits by shifting the locus of decision-

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[105] SEDJO, *supra* note 36, at 11. Similarly, in the pollution control arena, a systems approach "moves beyond simply controlling pollution levels from smokestacks or outflow pipes and instead focuses on land use decisions and local and regional planning efforts to ensure that development occurs in accordance with environmental principles such as pollution prevention and community vision." SHUTKIN, *supra* note 8, at 12.

[106] Increasingly, large urban areas in the United States have adopted some form of regional collaborative efforts between the central city and some or all of its suburbs. *See* Cashin, *supra* note 19, at 2028 n.224.

[107] Several of the more notable efforts are described in INTERAGENCY ECOSYSTEM MANAGEMENT TASK FORCE, THE ECOSYSTEM APPROACH: HEALTHY ECOSYSTEMS AND SUSTAINABLE ECONOMIES VOLUME III—CASE STUDIES (1996).

making power downward to local groups.[108] By unleashing and spreading these insights from their centralized moorings to fragmented, collaborative multi-stakeholder groups, reformers hope that local groups can achieve what regulators could not simply by their proximity to the problem.[109] Whether local collaborative groups will succeed, particularly in the face of social terrains as complex as the environmental concerns tackled by such groups, is a question that is of immense importance, and one that potentially carries significant environmental justice implications.

V. The Environmental Justice Implications of Devolved Collaboration

Achieving the full promise of devolved collaboration is highly dependent upon a number of factors. Collaborative decision-making is most apt to work in those situations in which all parties have strong incentives to reach a collective decision, where fundamental value-based conflicts do not divide participants, and where resources (that is, time, money, and expertise) are adequate to support the frequently lengthy process.[110] The existence of some of these factors will depend on the scale or physical qualities of the on-the-ground problem, as well as the resources available to participants in the process.[111] Even in the absence of some of these factors, collaboration may still help improve understanding and further delineate issues to be resolved.

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[108] *See, e.g.*, CBEP Framework, *supra* note 1, at 11 (noting that the roots and implementation of the CBEP program are based on the ideas contained in, among other things, ecosystem management, EPA's geographic programs, the Office of Water's "watershed approach," sustainable development, and the White House's reinventing government initiative).

[109] As one commentator explains in the context of EPA's CBEP Initiative:

> EPA recognizes that it cannot perform the research—and resource—intensive task of ecosystem management in every neighborhood in the country. Its strategy is to target its resources—to act directly in twenty percent of localities by taking the lead itself or by actively supporting some leadership effort. In theory those examples will spark voluntary efforts in the remaining eighty percent of the nation's communities. EPA will support those efforts where it can take advantage of economies of scale, by collecting and publishing data, by sharing success stories and ideas for emulating them, and by providing resources through programs such as the Brownfields Initiative and Sustainable Development Challenge Grants. The hope, however, is that diverse regional stakeholders will meet face-to-face, discuss their problems, and develop and implement sustainable ecosystem and sustainable community plans for themselves.

Nickelsburg, *supra* note 14, at 1376.

[110] *See, e.g.*, Wondolleck & Yaffee, *supra* note 15, at 48.

[111] *See* Nickelsburg, *supra* note 14, at 1393, 1409. For example, a skilled facilitator is often highly useful in distinguishing true value conflicts, which are rarely negotiable, from those built upon differences in preferences, misperceptions about costs and benefits, and simple miscommunications. *See* Kenney, *supra* note 14, at 44; Wondolleck & Yaffee, *supra* note 15, at 48.

There is nothing inherent in collaboration, however, either as a norm or a practice, that ensures a resolution to the problems of unequal representation and influence that underlie conventional decision-making processes and that are central to environmental justice critiques of those processes. In fact, the very prerequisites upon which the promises of devolved collaboration hang contain the seeds of its dangers. There is reason to believe that many collaborative efforts simply replicate, and perhaps even exacerbate, existing representation problems in new decision-making structures dependent upon consensus resolutions. Additionally, devolving or decentralizing decision-making influence can render these problems less visible or subject to scrutiny because the farther the process is removed from a centralized decision-maker, the less accountability there will be for the legitimacy of the process. This leaves environmental and natural resource decisions in the hands of a few local interests that may not account for the diversity of public values that devolved collaboration promises to bring to environmental problem-solving. Devolution may also entrench patterns of unequal influence of socially and economically vulnerable stakeholders, a problem that haunts conventional processes and is at the root of environmental justice claims.

Failure to address these equity problems inevitably derails the ability of devolved collaboration to achieve its own promise. That is, much of the promise of this approach to yield better, fairer, and more legitimate, environmental decisions depends so crucially on which individuals are included in the process and the corresponding values, norms, and influence they bring with them. If inadequate attention is given to these process concerns, then devolved collaboration can have significant negative environmental justice implications, including the aggravation of disparities in the distribution of costs and benefits of environmental regulation by race and class.

A. The Tension Between Representational Equity and Geographic Scale

If collaboration is to achieve its substantive and normative promise, it must strive for a quality and balance of representation. This representation is difficult to achieve, particularly when there are many types of communities at issue—whether defined by geographic place, common ethnic or economic identity, or common interests. Moreover, in collaborative processes, governmental regulators are crucial stakeholders, as are representatives of interests that have different relationships to the environmental conflict or concern. Other stakeholders may be more difficult to identify and involve (e.g., future generations), but nonetheless demand some form of representation.[112]

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[112] Ideal representatives are those empowered to speak for or bind a particular constituency or interest group. *See* Rossi, *supra* note 40, at 246.

The desire for broad inclusion, however, must be balanced by the practical requirements of consensus decision-making. Achieving consensus often depends upon a strong degree of homogeneity within collaborative groups.[113] That is, consensus decision-making is extremely dependent upon finding mutually beneficial, or "win-win," solutions. This provides a strong group incentive for limiting the diversity of participants, particularly in a way that excludes minority interests likely to express values or preferences inconsistent with those of other participants, or for demonizing such participants within the collaborative process. This exclusion may be further aided by processes that are largely unstructured and opaque, conditions that can encourage "capture" of the process by a group of local stakeholders who achieve consensus through exclusion, intimidation, or coercion.

Devolution, then, can be the tool used by a local group to exclude legitimate interests and to produce a disingenuous consensus. This is the charge leveled by critics of QLG, which allegedly achieved local consensus only through the exclusion of legitimate "outside" interests.[114] Chief among those excluded was the U.S. Forest Service, the systematic demonization of which accounted for, in some minds, much of QLG's legitimacy and strength in reaching a local consensus.[115] The lack of direct involvement of the Forest Service was particularly troublesome since it was a key stakeholder, the government agency responsible for the three National Forests affected by QLG's plan.[116] Also notably absent from deliberations were representatives of national environmental groups.[117]

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[113] *See, e.g.*, Anderson & Leal, *supra* note 15, at 145–46 (summarizing several factors that characterize community management systems, and noting that a strong group identity, aided by group homogeneity, is essential for these factors to emerge).

[114] *See infra* Part III.A. As one commentator reports:

> The QLG meetings are . . . open to anybody and have included up to 350 attendees at once, but the atmosphere is hostile to anyone who challenges the proposal. "We started out as a consensus process," says Jackson [one of the founders], "but . . . [we're not anymore]—now we're a consensus-acquiescence process . . . we intimidate the hell out of each other."

Duane, *supra* note 28, at 795.

[115] Duane, *supra* note 28, at 789–90. The reasons for exclusion of the Forest Service are open to debate, however:

> Some argue that it was the Forest Service's reluctance to participate as a full partner; others that it was the QLG's failure to fully include those federal land managers. Still others blame the decision to oppose the group's efforts by the national environmental community, while others attribute it to the failure of the QLG to include those interests. Still others cite the overzealousness of elected officials who raised the banner of a community success story and thereby politicized it in ways that tarnished its cooperative beginnings.

WONDOLLECK & YAFFEE, *supra* note 15, at 264–65.

[116] Duane, *supra* note 28, at 789–90.

[117] *Id.* at 791.

This exclusion was evident from the coalition of forest protection organizations that organized to block the QLG bill in the Senate, forcing proponents to secure passage of the proposal by attaching it as a rider on an appropriations bill.[118]

The exclusion of national stakeholders in collaborative efforts is particularly troublesome in the natural resources context where national interests are almost always implicated in local efforts. These interests are easily excluded, particularly in informal, ad hoc collaborative processes in which representatives from national environmental groups may not reside in the locality or may lack the ability or legitimacy to speak for national interests or future generations. These observations lead to a troubling conclusion: if devolved collaboration achieves a greater involvement of local interests only at the expense of a reduced presence of national interests, then the problem of inadequate representation in natural resources management has not been resolved, but only modified.[119]

To be sure, many of the representation problems associated with devolved collaboration can presumably be minimized through the use of more structured or regulated processes. This approach is frequently seen, for example, in rules establishing site-specific citizen advisory boards and committees. Generally, these rules provide for a specific number of representatives from various stakeholder groups, as well as from federal, state, and local agencies. Advisory committees are also apt to make their deliberations transparent, unlike some ad hoc collaborative groups, which helps to ensure appropriate and adequate representation. However, as will be discussed below, even where formal representation is regulated, the assurance of representative and egalitarian decision-making can remain elusive in communities with disparate degrees of social capital.

B. Collaboration Without Social Capital

Beyond the potential for exclusion of national interests, the issue of representation is raised in a more potent way, one that quite saliently involves environmental justice concerns. Collaborative processes depend upon some degree of social capital among their potential participants, particularly at the local level. In general, "social capital" refers to the "norms and networks of civil society that lubricate cooperative action among both citizens and their institutions."[120]

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[118] *See id.* at 784; Michael McCloskey, *Problems with Using Collaboration to Shape Environmental Public Policy*, 34 VAL. U. L. REV. 423, 431 (2000).

[119] And, arguably, history will have been repeated. In the 1950s, local groups co-opted similar resource management collaborative processes in the form of grazing boards and fishing councils. *See generally* PAUL J. CULHANE, PUBLIC LANDS POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT (1981).

[120] Robert Putnam, *Foreword*, 9 HOUSING POLICY DEBATE, at v (1998); *see also* JAMES COLEMAN, FOUNDATIONS OF SOCIAL THEORY 300–21 (1990).

Social capital as a theory originates in the early twentieth century, but has been most developed recently by the late sociologist James Coleman and political scientist Robert Putnam of Harvard University.[121] Social capital exists where a community has a history of strong associations or networks in which its members have made common decisions together, developed trust, and formed bonds of solidarity and respect.[122] These norms—mutual trust, reciprocity, credibility, and respect—are necessary in order to solve common problems through collaborative processes. In the same way, the development of social networks between and among different groups or interests—that is, the ability of different stakeholders to form linkages with one another—is a crucial precursor to consensus-building.

Social theorists have come to understand social capital as having both horizontal and vertical aspects.[123] In general, horizontal social capital refers to those social networks that bring together agents of *equivalent* status and power. Vertical social capital refers to those social networks that link *unequal* agents in asymmetric relations of hierarchy and dependence. The existence of both vertical and horizontal social capital is crucial to the ability of collaboration to overcome the exclusionary tendencies of current pluralistic processes.[124] While proponents have been keen to focus on the social capital that emerges in communities that successfully employ devolved collaboration, there seems to be very little recognition that collaboration also depends upon its preexistence in those communities.[125] Unfortunately, many socially and economically disadvantaged communities are vulnerable to numerous forces that undermine the social capital necessary to form and sustain collaborative partnerships.[126] In the absence of horizontal or vertical social capital networks already in place, the entire collaborative project is in jeopardy—broad representation will be difficult to achieve and a legitimate consensus will be unattainable.

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[121] *See generally* ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIL TRADITIONS IN MODERN ITALY (1993) [hereinafter MAKING DEMOCRACY WORK]; Robert Putnam, *Bowling Alone: America's Declining Social Capital*, J. DEMOCRACY, Jan. 1995, at 65.

[122] *See* COLEMAN, *supra* note 120, at 304.

[123] *See* MAKING DEMOCRACY WORK, *supra* note 121, at 173; *see also* Robert E. Lang & Stephen P. Hornburg, *What Is Social Capital And Why Is It Important To Public Policy*, 9 HOUSING POL'Y DEBATE 1, 4 (1998).

[124] *See generally id.*

[125] *See, e.g.*, Nickelsburg, *supra* note 14, at 1393 (noting that continuing interaction amongst participants builds credibility, trust, and respect); WONDOLLECK & YAFFEE, *supra* note 15, at 162–65 (same).

[126] *See* David L. Debertin, A Comparison of Social Capital in Rural and Urban Settings (unpublished manuscript), *at* http://www.uky.edu/~deberti/socsaea.htm (last visited Apr. 30, 2002) (on file with the Harvard Environmental Law Review).

1. Stakeholder Diversity and Social Capital

Horizontal social capital is particularly important for collaborative processes that involve multiple or dispersed constituencies that would be significantly impacted by a particular environmental or resource decision.[127] To the extent that collaborative decision-making depends upon bringing together stakeholders differently situated in a community to deliberate toward mutually satisfactory solutions, it is vulnerable to fluctuations in social capital within and among communities (whether defined by geography, identity, or interest). Many of the problems associated with social and economic disadvantages in this society also correlate with the decline, or absence, of horizontal social capital in many communities, thus jeopardizing collaborative processes in socioeconomically diverse areas.[128]

For instance, imagine a forestry partnership similar to QLG seeking to assemble a coalition of environmentalists, civic organizations, community residents, timber industry representatives, and other impacted constituencies interested in the fate of a particular forest. One of the constituencies that might be impacted in such a situation are non-timber forest workers (e.g., wild mushroom pickers) typically composed of various immigrant or other disadvantaged groups (e.g., Southeast Asians, Native Americans, Mexicans, Guatemalans, Salvadorans, or low-income Europeans). These groups, or constituencies, tend not to be a part of any dense social network; in fact, they tend to be politically disorganized and geographically mobile.[129] As such, they have a history of exclusion from traditional natural resource decision-making processes that fundamentally affect their lives and livelihoods.[130] Without a tradition of civic engagement within such communities, or extraordinary efforts by government agencies or nonprofit groups to help establish networks for such groups, it will be quite difficult to assemble a broadly representative decision-making process to include such a constituency. Failure to achieve the requisite stakeholder representation may marginalize anew, in an ostensibly more inclusive decision-making structure, previously disenfranchised segments of the stakeholder population.[131]

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[127] Even in geographically compact and homogenous communities, horizontal capital is crucial to the ability of different constituencies in a community, or different affected communities, to appoint or empower appropriate representatives, who will in turn bring community values to the process.

[128] For instance, poor housing conditions, lack of adequate employment and education, segregated housing, and community disinvestment directly contribute to the breakdown of social capital networks. *See* Debertin, *supra* note 126 (stating that "with few exceptions, ethnically and racially diverse areas tend to have low social capital").

[129] *See generally* Rebecca Jean McClain, Controlling the Forest Understory: Wild Mushroom Politics in Central Oregon (2000) (unpublished Ph.D. dissertation, University of Washington) (on file with the Harvard Environmental Law Review).

[130] *See generally id.*

[131] *See, e.g.*, Kris Wernstedt, *Terra Firma or Terra Incognita? Western Land Use, Hazardous Waste, and The Devolution of U.S. Federal Environmental Programs*, 40 NAT. RE-

2. Status and Social Capital

Collaborative processes are also likely to be problematic in communities with insufficient vertical social capital between stakeholders who possess different social, economic, or political status. As others have noted, consensus decision-making processes can suffer from the same inequitable distribution of social power and influence, more often than not along lines of race and class, as current processes.[132] This disparity often tracks and contributes to the breakdown of social capital between racial and ethnic groups, whose intragroup social networks are frequently stronger than the intergroup networks that cross racial and ethnic lines. Without sufficient vertical capital, traditionally underrepresented groups or interests might be disenfranchised from local officials running the process, or subject to further exclusion on the basis of prejudice or lack of respect.

For example, in his study of the use of advisory committees in three California communities, Luke Cole attributes the success of a committee in one community and the failures of committees in two other communities partly to local power struggles among interests differently situated in terms of social capital.[133] Under the California act mandating the use of community advisory committees (referred to in the statute as "local assessment committees") in toxic waste facility siting decisions, the local agency or body (for example, a city council) appoints three representatives of the "community at large" out of its seven total appointees.[134] However, it is often unclear who adequately represents the "community at large." Moreover, as Cole has demonstrated, since local officials usually appoint members on advisory committees, representation can easily become an issue of the relative power of local officials in the selection process and the influence of powerful interests over those officials.

In both communities where the advisory committees were deemed "unsuccessful,"[135] the committee was widely considered to be both geo-

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SOURCES J. 157, 176 (2000). *See generally* Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Justice Advocacy*, 14 VA. ENVTL. L.J. 687 (1995).

[132] *See, e.g.*, Freeman & Langbein, *supra* note 97, at 66 (reporting a study of consensus-based rulemaking processes at EPA that found that undue influence among participants occurs at the same rate as in conventional processes).

[133] Luke W. Cole, *The Theory and Reality of Community-Based Environmental Decision-making: The Failure of California's Tanner Act and Its Implications for Environmental Justice*, 25 ECOLOGY L.Q. 733 (1999).

[134] CAL. HEALTH & SAFETY CODE § 25199.7 (West 1992). Other appointees include two representatives of environmental or public interest groups and two representatives of affected businesses and industry. *Id.*

[135] Cole characterizes the successful committee as one in which the "[local committee] process worked as it was designed. Active and engaged members took part in the . . . process, educated themselves, and were educated by the [committee's technical] consultants." Cole, *supra* note 133, at 740. Successful committees also left the community feeling "included" and resulted in the production of "reports and recommendations." *Id.* at 751.

On the other hand, Cole characterizes unsuccessful committees as those that "operated

graphically and demographically unrepresentative of the community where the proposed facility was to be located. Cole posits that, indeed, "central to the failure" of the two unsuccessful local committees was the demographic asymmetry between the impacted community, on the one hand, and the appointing decision-makers and committee members, on the other hand. [136] The host communities of the two unsuccessful committees were "overwhelmingly communities of color," while the appointing officials and the committee members were "overwhelmingly white."[137] Just the opposite was true in the case of the successful committees, where the economic and racial homogeneity of the impacted communities' population was reflected both among the appointing decision-makers and committee members.[138]

This lack of representativeness both highlighted and further entrenched the distrust between the excluded members of significant portions of the "community at large" and those committee members chosen to represent them. The lack of vertical social capital existing between the appointing decision-makers and the majority of the impacted population also became evident during the course of the collaborative process. In one of the majority-Latino communities, the "local" collaborative process began with no Latino residents of the community on the committee.[139] In another majority-Latino community, committee meetings were held forty miles from the host city, making even informal representation of

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not as a vehicle for public input, but as a wholly-owned subsidiary of county government" and that "failed to provide sufficient inclusion for those most directly affected" by the decision at hand. *Id.* at 743–44. In contrast to fulfilling the aspirations of public input and broad deliberation, unsuccessful committees resulted from the process not being taking seriously or active subversion of the process. *Id.* at 751.

[136] *Id.* at 751–52.

[137] *Id.* at 752.

[138] *Id.* at 751–52 (noting that in the "successful" case study, 100% of local decision-makers and committee members were white, and the host community was 88% white; in one of the "unsuccessful" case studies, 100% of local decision-makers were white, 86% of committee members were white, and 95% of the host community was Latino; in the other "unsuccessful" case study, 100% of decision-makers were white, 91% of committee members were white, and the host community was 35% white, 53% Latino, and 12% black).

[139] Cole, *supra* note 133, at 745. One Latino member from the host city of Buttonwillow was, however, selected many months later. Cole writes:

> In the twenty-seven months that the [committee] did not meet, two members resigned and one died. Despite applications from Latino [residents], the County selected two replacements from outside the community, both of whom were white. In a move that confirmed to Buttonwillow residents that the County was racially biased in selecting members for the [committee], one white [resident], whose application had not been submitted during the [committee] application process (as the Latinos' applications had) was also selected. When another white member of the [committee] resigned in protest and said that a Latino from Buttonwillow should be appointed, the Board finally appointed . . . a farm worker foreman from Buttonwillow . . . in September 1994.

Id. at 746.

that city difficult, particularly for the predominantly low-income population.[140] Moreover, the lack of translators at many meetings and the lack of written translations of many documents in both communities with majority-Latino populations "created large barriers to entry by making information inaccessible as well as creating an unwelcome climate for many residents."[141]

In contrast, in the case of the one "successful" use of a committee, city council officials drew committee members from a local area that was more geographically compact and demographically homogenous. Moreover, the interests of the officials who appointed the committee and the members of the committee happened to be identical (both were against the facility siting).[142] This homogeneity, Cole notes, not only made achieving broad representation easier, but also likely increased the committee's effectiveness in reaching consensus and responsiveness to public input.

The lack of social capital between the different racial, ethnic, and economic segments in Cole's two failed case studies, and the resulting underrepresentation on local committees, is tellingly instructive of the limitations of devolved collaboration. In many vulnerable communities, because of low levels of social capital, local stakeholders will be unable to participate meaningfully in collaborative processes. These vulnerable stakeholder groups will thus be forced to appeal to centralized authorities to obtain a voice in the very processes set up by these authorities to enhance local power and input. Indeed, that is what happened in both "unsuccessful" uses of local committees in Cole's study. Excluded residents appealed to state and federal administrative and judicial authorities, claiming that their rights to participate in the process, and their civil rights, had been violated.[143] Thus, the irony of efforts to devolve decision-making influence to the local level may be their potential to disempower the very local interests those processes are designed to empower.

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[140] *Id.* at 744 (discussing the Kettleman City case).

[141] Catherine McCarthy, Testing the Tanner Act: Public Participation and the Reduction of Local Opposition in Siting Hazardous Waste Facilities in California 569 (1999) (unpublished Ph.D. dissertation, University of California, Davis) (discussing Kettleman City) (on file with the Harvard Environmental Law Review); *see also* Cole, *supra* note 133, at 746 (noting that the local committee in Buttonwillow requested technical assistance grants for translation of documents into Spanish for one of its members and for technical consultants, but that local officials "opposed" and ultimately "turned down every request"). Additionally, intimidation in one Latino community became a tool of exclusion when a number of undocumented residents were arrested by the Immigration and Naturalization Service at a community meeting. McCarthy, *supra*, at 569–70.

[142] Cole, *supra* note 133, at 740–42. This stands in contrast with one of the "unsuccessful" cases, where the local appointing officials, county supervisors, selected individuals from the surrounding county with token representation from the host city and showed a preference for individuals in favor of the facility being sited. *Id.* at 733–34, 745–46.

[143] *Id.* at 745–49.

C. The Substantive Danger in Consensus Processes

Another source of disempowerment for minority interests is the collaborative process itself, namely its requirement of consensus. One of the central insights of environmental justice theory is that process and distributional inequities are crucially intertwined in the production of regulatory costs and benefits.[144] The recognition that distributional patterns and decision-making processes depend upon and reinforce one another entails a particular type of scrutiny of devolved collaborative processes, at least when viewed through the lens of environmental justice. As already discussed, a legitimate collaborative process will depend upon an adequate distribution of material resources, social capital, and other social goods crucial to participation in those processes. Local interests with large deficits in these goods and resources will be excluded from such processes and, as with conventional decision-making processes, will disproportionately bear the costs of consensus-based outcomes and perhaps reap few of their benefits.

Even with broad representation, however, devolved collaborative processes can be highly problematic from a substantive point of view. As critics of consensus aptly observe, the theory of consensus itself contains an inherent ideological bias. Its emphasis on securing unanimous agreement through the identification of common interests ("win-win") can be antithetical to achieving substantive justice.[145] Such emphasis can skew the process in favor of the outcome that reflects the lowest common denominator acceptable to all parties. The problem with outcomes reflecting the lowest common denominator is that, while the process can be deemed "legitimate" in a democratic process sense, its outcome may reflect what commentators call a "domination by means of leveling."[146] In other words, it tends to leave out difficult, unpopular, or minority concerns, and may orient the process away from sorely needed innovative solutions that address these concerns.

The substantive bias also reveals itself in the very mechanisms upon which consensus depends. Consensus simultaneously stresses agreement and compromise while "veiling the increased potential for coercion by leaders" of collaborative groups.[147] The primary mechanism through which this coercion is practiced is the veto power possessed by each par-

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[144] *See* Foster, *supra* note 11, at 790–91.

[145] *See* Jim Britell, *The Myth of "Win-Win," at* http://www.britell.com/text/tuse11c.html (1997) (noting that "our history from the revolution forward provides abundant examples that justice and liberty are sometimes best served by absolutely refusing to sit down and find 'common ground' and 'win-win' solutions") (on file with the Harvard Environmental Law Review).

[146] William K. Rawlings, *Consensus in Decision-making Groups: A Conceptual History, in* EMERGENT ISSUES IN HUMAN DECISION-MAKING 19, 31 (Gerald M. Phillips & Julia T. Wood eds., 1984).

[147] *Id.* at 33.

ticipant. This veto power can force agreement by threatening complete failure of the process if it is exercised. Given current disparities in material resources and social capital, "those with greater power possess and frequently use their prerogative to exert substantial influence over other members and, through them, the content of group decisions."[148] In this way, by forcing agreement through coercion, more powerful and knowledgeable participants are able to co-opt dissident viewpoints that may be critical to seeking more creative and just decisions.[149]

By ignoring, marginalizing, or co-opting difficult questions of distributional justice, or other pressing policy dilemmas, consensus processes at their most benign replicate the status quo. Communities disproportionately bearing the costs of current environmental policy and natural resources management may not be left any worse off by consensus solutions, but they will not likely be helped by them either. At their most dangerous, consensus solutions may change the status quo for the worse, exacerbating existing distributional disparities. In the final analysis, the outcomes from some consensus-based process will no more reflect the "public interest" than the problematic pluralistic processes they replace.

VI. Beyond Devolved Collaboration

The ideal of devolved collaboration expresses quite well the democratic wish of those who desire more inclusive, representative, creative, and effective environmental decision-making. The "democratic wish"—the imagery of a single, united people bound together by consensus over the public good that is discerned though direct citizen participation in community settings—has a long tradition in America.[150] It is, as James Morone has emphasized, a "legitimate, populist counter to the liberal status quo" that various social movements have seized upon at critical moments throughout American history.[151] Ultimately, however, the democratic wish is Utopian in its imagery of a "people" coming together to deliberate, unite around conceptions of the common good, and restore

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[148] Julia T. Wood, *Alternative Methods of Group Decision-making: A Comparative Examination of Consensus, Negotiation and Voting in* Emergent Issues in Human Decision-making, *supra* note 146, at 3, 11; *see also* Freeman & Langbein, *supra* note 97, at 90–91 (reporting that some participants in negotiated rulemaking enjoy the powerful advantage of access to and control of superior information that gives them disproportionate control of the agenda relative to the control exercised by smaller, less informed interests).

[149] *See, e.g.*, Bruce A. Williams & Albert R. Matheny, Democracy, Dialogue, and Environmental Disputes: The Contested Languages of Social Regulation 190 (1995) (noting that local advisory committees can be dominated by more powerful interests, like industry in the toxics area, and their "broadly representative composition may be used to pit a 'consensual' [committee] understanding of toxics policy against the 'radical' one advocated by a local grassroots group, thus discrediting the latter").

[150] *See* James A. Morone, The Democratic Wish: Public Participation and the Limits of American Government 5–9 (1991).

[151] *Id.* at 9.

community among and across broad interest groups.[152] The trouble with participatory yearning, explains Morone, is "its innocence of organizational dynamics" and the constraints that new forms of participatory arenas can place on the very fundamental changes taking place.[153] These constraints tend to "limit the oppressed at the same time as it legitimates them," in part because the democratic urge and its new forms of participation tend to "leav[e] behind the underlying conditions it found: a political economy of self-seeking interests pushing ahead within a complex welter of political rules that advantage some citizens, disadvantage others, and seem almost invisible to all."[154]

The search for improved, legitimate, and equitable environmental decisions will require more than crafting a stronger participatory norm and shifting decision-making power to the local "people" affected by environmental decisions. Any decision-making process that hopes to improve participation must pay sufficient attention to the political economy and resulting social relations of constituencies in a participatory process. Disparities in representation and influence among interests in collaborative processes are inextricably linked to the same set of social relations that make conventional decision-making processes problematic.

This is not to say that devolved collaboration cannot satisfy the normative aspirations, including distributive and procedural justice, underlying its ascent in environmental reform efforts. Even with current structural and social inequalities, such processes (and indeed even conventional processes) can achieve broad, inclusive representation and arrive at outcomes that reflect participants' ability to rise above the lowest common denominator to address vexing issues of environmental and natural resources policy. The caution that this Article is advocating is that policy reforms should bring a more nuanced assessment in determining which decision-making structures will achieve important democratic process and substantive goals in particular contexts, taking into account the ecological, social, and political factors characterizing the concerns such reforms seek to address.

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[152] *See id.* at 323 (writing that "[t]he often tumultuous, always unstable democratic urge does not introduce a workable notion of the people, or of the public interest, or of participatory community politics").

[153] *Id.* at 335.

> The lure of communal consensus overcomes the barriers to reform by prompting the design of new political arenas. The new institutions offer previously overlooked (or suppressed) interests an opportunity to enter American politics while focusing their struggle on representation at the political periphery. The pattern constrains the changes it enables. Despite the introduction of new interests and institutions, the process ends as it began: with the incoherent clash of private and public interests.

Id. at 323.

[154] MORONE, *supra* note 150, at 323.

The debate surrounding the appropriate scale of decision-making in the local government arena illustrates the type of normative coherence and focus that can aid efforts to reform decision-making processes about public goods.[155] In this context, it is the so-called "regionalists" that worry about the inequities that can result from highly decentralized decision-making and the self-maximizing ways in which decision-making powers are exercised.[156] For instance, given the uneven distribution of property wealth and service needs, affluent localities benefit the most under "localism" while poorer areas suffer.[157] "Localists" counter that decentralized decision-making, in general, promotes the efficient provision of public goods and services, provides local citizens with more meaningful opportunities for participation in government decisions, and gives citizens the power to shape their communities.[158] Both sides agree that decision-making arrangements should seek to satisfy norms of efficiency, democracy, community, and equity, but disagree about which form of governance will best advance these goals.[159]

As the debate about New Regionalism in local government law suggests, reformers might be better off paying more attention to the normative goals sought through environmental governance structures than to attempts at crafting universal solutions to the dysfunctionality that plagues current decision-making processes. What is the proper locus of, and the most appropriate structure for, decision-making that effectively manages complex decisions about social goods is not likely a question subject to a universal answer. Rather, calls for decentralized, collaborative processes should be viewed as a collective demand for a shared set of normative goals. Those goals include: deeper public participation by those most affected by environmental decisions, accountability of decision-makers (both public and private) to those they represent, incorporation of community values and local expertise in environmental decisions, active deliberation among stakeholders, equity among all interests and partici-

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[155] *See generally* Richard Briffault, *Our Localism, Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) [hereinafter *Our Localism*]; Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993); Cashin, *supra* note 19.

[156] *See generally* Frug, *supra* note 155.

[157] *See generally Our Localism*, *supra* note 155.

[158] *See generally* Frug, *supra* note 155.

[159] *See, e.g.*, Cashin, *supra* note 19, at 2042–47 (arguing that the three localist values—citizen participation, efficiency, and community—are being undermined by the localist vision, and that a regionalist system would better vindicate these values); Frug, *supra* note 155, at 256 (acknowledging that the "combination of suburban power and city powerlessness has had disastrous consequences for American life," "in deny[ing] the poor access to jobs," producing "increased interracial inequality," and proposing government reforms to force localities to consider the impact of their actions on their regions while still retaining substantial power).

pants (vis-à-vis resources, influence, and representation), and fairness in the distribution of the costs and benefits of decision-making outcomes.

How one goes about achieving these goals in a particular decision will depend upon a close examination of the context in which the decision is to be made. One key contextual element is the ecological nature of the problem. Devolved collaboration may not be appropriate for many public natural resource decisions because of potential underrepresentation of national, diffuse, and future interests. Devolved collaboration likely gives greater weight to the economic interests of citizens near the natural resources than to the noneconomic interests of more distant, and often urban, stakeholders who use and appreciate resources on public lands.[160] The result is the triumph of local values over those held by more widespread, dispersed constituencies and future interests.[161] Arguably, this outcome is much more defensible in the context of pollution control decisions, particularly those where the most-impacted populations are geographically compact and readily identifiable. Examples include the cleanup, redevelopment, and reuse of land and the siting of hazardous facilities. These are decisions that involve a very limited and manageable class of interests—i.e., those populations that are likely to bear most of the social, economic, and health impacts of the proposed decision.

But even in ecological contexts where the impacts of environmental decisions are predominantly local, such as cleanup and redevelopment of land, devolved collaborative efforts can still be problematic, particularly in the most vulnerable communities. The social, political, and economic context of a community is certainly crucial in deciding the appropriateness of, and potential for, devolved collaboration. Collaborative processes, as explained above, are likely to be problematic in communities with insufficient amounts of social capital between and among different interests and stakeholders. Conversely, devolved collaborative efforts are far more likely to be successful in communities with a healthy amount of social capital, or where there is already fertile ground for social capital to be established through collaborative processes. For example, success will be more possible in highly demographically and geographically homogenous communities without significant value conflicts among constituents (where the values of the costs and benefits are not fungible or are incommensurable), or with a powerful common enemy that unites factions

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[160] *See, e.g.*, McCloskey, *supra* note 118, at 431 (noting that even if "[s]pokepersons for the relevant national groups might be appointed" to collaborative community partnerships, "it would not be convenient or economically feasible for them to attend frequent meetings in far-off places"); Duane, *supra* note 28, at 795 (noting that in Quincy Library case, "the rural isolation of Quincy . . . ensured that non-local environmentalists are outsiders in any QLG 'community' meetings, and the physical distance to Quincy makes it difficult for them to participate").

[161] Nor would devolved collaboration work for problems whose solutions are, or need to be, regional or national. For example, acid rain could not be solved by devolved collaboration nor could ozone problems.

of unequal influence and power. Indeed, the growing number of anecdotal accounts of successful collaborative efforts attests to the successful use of such efforts exactly in these contexts.[162]

The identification of a core set of normative goals—including procedural and distributional justice—for environmental and natural resource decision-making can be useful in both increasing meaningful participation by local actors and communities and strengthening the hands of central authorities to ensure these goals are met. These normative goals can guide political institutions and their constituents in determining the best use of an array of decision-making tools at their disposal in particular contexts. At the same time, a contextual-based approach preserves accountability to centralized decision-makers responsible for the achievement of these principles or goals. Without this accountability, simply devolving decision-making influence to local collaborative groups does not specify the means of achieving the promise of this model, including its aspiration of more equitable decisions.

VII. CONCLUSION

The enthusiasm for devolved collaboration represents a remarkable embrace of a core set of principles crucial to better and fairer environmental decisions. However, like its predecessor decision-making approaches, this evolving approach is indifferent to the ecological, social, and political conditions necessary to realize its own promise. Rather, devolved collaboration may in fact further solidify some of the very problems, including procedural and distributional injustice, that its ascendancy is theoretically designed to address. Thus, simply devolving decision-making influence to local levels does not perform the necessary work of specifying the means of achieving these principles in the varied and complex contexts in which our most vexing environmental concerns reside. That work, unfortunately, remains to be done.

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[162] For instance, the success of QLG, discussed in Part III.A, may be attributable in no small part to a common enemy, the U.S. Forest Service. The members of QLG were able to point effectively the finger at the Forest Service, helping them to avoid pointing the finger at each other and facilitating a common point of departure for all sides. Duane, *supra* note 28, at 789–91. Similarly, in communities with a history of strong social capital—e.g., where there are well-established grassroots groups or other social networks—there has been remarkable success in convening different stakeholder interests into collaborative structures. *See, e.g.*, SHUTKIN, *supra* note 8, at 168–87 (citing Oakland study). *See generally* WONDOLLECK & YAFFEE, *supra* note 15 (reviewing various case studies of successful devolved collaborative efforts and acknowledging the limitations and critiques of such efforts).